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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	IB Docket No. 98-192
Direct Access to the	)	File No. 60-SAT-ISP-97
INTELSAT System	)	

REPLY COMMENTS OF BT NORTH AMERICA INC.

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Dated: January 29, 1999

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BT North America Inc. ("BTNA"), by its attorneys, hereby replies to certain comments filed in response to the *Notice of Proposed Rulemaking*, FCC 98-280 (rel. Oct. 28, 1998) ("Notice"), in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

Alone among the commenters in this proceeding, Comsat misapprehends the question confronting the Commission. Its voluminous submission is designed solely to justify and preserve its status as the sole provider of United States space segment services to the INTELSAT system -- at the expense of rational telecommunications policy, competitors and consumers. But make no mistake: the issue here is not the anomalous history that resulted in Comsat's *de facto* monopoly -- as to the existence of which there is no dispute. Rather, it is whether the Commission has discretion under the public interest standard of the Communications Act and the Satellite Act to implement Level 3 and Level 4 direct access to the INTELSAT system, and whether it should exercise that discretion. As

BTNA demonstrated in its opening Comments and in these Reply Comments, the answer to both questions is clearly "Yes."

Comsat dwells at length on the background of the Satellite Act but gives short shrift to the actual language of the statute, which clearly must be the starting and focal point for the Commission's analysis. And that language establishes that Congress intended the Commission to afford all authorized carriers equitable access to the INTELSAT system -- in 1961 and in the future, and irrespective of the rights conferred on Comsat in response to diplomatic and competitive exigencies at the time the statute was enacted.

Thus, the Satellite Act granted the Commission discretion to authorize common carriers other than Comsat to provide direct access to the INTELSAT system, consistent with the requirements of Section 214 of the Communications Act of 1934 and as warranted by the public interest. Nowhere in the Satellite Act did Congress provide that Comsat was to be the "sole" or "only" or "exclusive" point of entry to the new international system. Furthermore, the legislative history of the Act demonstrates that it was not intended to interfere with or limit any of the existing regulatory prerogatives of the FCC. To the contrary, the legislative record reveals an intent to devise a flexible regulatory framework precisely because Congress -- devising legislation at a point when an organized system of international satellite telecommunications was merely a theoretical possibility, rather than a commonplace reality -- understood that evolving technological,

economic and diplomatic circumstances would result in demands for "different kinds of services to serve different needs as time goes on."

The wisdom of Congress' vision has been validated by the D.C. Circuit Court of Appeals, which, in construing the Satellite Act, has observed that the received wisdom during the initial period of INTELSAT's deployment necessarily would evolve, with the system, as the twin goals of competition and equitable access assumed greater importance. In particular, the court has rejected the view that statements made in the climate of urgency surrounding the passage of the Satellite Act demonstrate Congressional intent to preserve Comsat's initial role in regulatory amber. The Satellite Act, in other words, like the international satellite system whose early development it was designed to promote, is organic and flexible, permitting a fluid regulatory approach to accommodate a rapidly changing communications environment.

BTNA demonstrated in its Comments that the implementation of Level 4 direct access in the United Kingdom has resulted in reduced costs for INTELSAT access and increased competition in the satellite services market in the U.K. Numerous other commenters have presented evidence of the substantial public interest benefits that would derive from the implementation of Level 3 and Level 4 direct access in the United States. In addition to the consumer benefits that already have been documented by INTELSAT and that the Commission has recognized in the Notice, implementation of direct access would directly enhance

competition in the provision of international telecommunications services. Specifically,

- Implementation of direct access would drive the cost of INTELSAT access down towards the IUC level.
- Reductions in carriers' costs of providing international services would produce lower costs for end users.
- Competitive opportunities for new entrants into the space segment market would result in more choices for end users.

Meanwhile, Comsat has presented no justification for its contention that direct access would harm U.S. consumers; indeed, Comsat consistently substitutes its private business interest for the public interest. Thus, for example, Comsat contends that implementation of direct access would afford INTELSAT "unfair" access to the domestic telecommunications market. *In fact, it would enable U.S. entities to participate in INTELSAT without being subject to a bottleneck controlled by a monopoly supplier.* Comsat contends that direct access would attenuate its Signatory role in INTELSAT governance. *In fact, U.S. influence in INTELSAT governance would only increase if U.S. investment share rises relative to other Parties as a result of greater demand for INTELSAT services in the United States stimulated by the new competitive market place.* And Comsat contends that direct access is unnecessary to stimulate competition because it already faces meaningful competition from other international satellite and transoceanic cable

operators. *In fact, the limited intermodal competition that Comsat describes has been ineffective in moving Comsat's prices down to cost.*

By implementing Level 3 and Level 4 direct access to INTELSAT space segment, the Commission will fulfill its statutory mandate under the Satellite Act to ensure nondiscriminatory access to the INTELSAT system, increase the availability of telecommunications services, and maximize competition in the provision of such services. Meanwhile, the Commission will confirm and expand the United States' determination to take a leading role in stimulating and facilitating the transition to a truly competitive international telecommunications marketplace.

II. THE STATUTORY LANGUAGE, LEGISLATIVE HISTORY, AND SUBSEQUENT INTERPRETATIONS OF THE SATELLITE ACT ALL ESTABLISH THAT THE COMMISSION HAS DISCRETION TO AUTHORIZE COMMON CARRIERS TO PROVIDE LEVEL 3 AND LEVEL 4 DIRECT ACCESS TO THE INTELSAT SYSTEM.

[Notice, Section II(1)]

Purporting to rely on the language and structure of the Act, Comsat contends that it has a lawful monopoly on access to INTELSAT space segment services, and argues that the FCC therefore cannot mandate Level 3 (or Level 4) direct access. Yet, in its determination to justify its *de facto* monopoly and throughout more than 400 pages of filings in its opening submission alone, Comsat refuses to confront the actual subject of this proceeding, to wit, whether the Commission has the discretion under the public interest standard of the

Communications Act and the Satellite Act to implement Level 3 and Level 4 direct access to the INTELSAT system.

Comsat would have us believe that the FCC's authority exists merely as a complement to Comsat's monopoly power and is limited to whatever is left over from what Comsat alleges to be its permanent statutory franchise. But this is incorrect. As BTNA demonstrated in its Comments and as it elaborates below, the powers delegated to the Commission by Congress are more than adequate to give the FCC discretion to implement both Level 3 and Level 4 direct access.

A. The Text of the Satellite Act Establishes That the Commission Has Authority to Grant Level 3 and Level 4 Direct Access to INTELSAT Space Segment.

Although Comsat's Comments and accompanying "Statutory Analysis" discuss the historical and legislative background of the Satellite Act at great length before turning to the text of the Act itself, the proper starting point for a determination of the complex responsibilities and powers delegated by Congress to an independent agency is the language of the statute itself. *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 558, 99 S.Ct. 790, 795 (1979). The plain text of the Satellite Act extends the FCC's power rather than diminishes it, and provides no support for Comsat's allegations of mandatory exclusivity with respect to direct access.

1. The Satellite Act Explicitly Builds Upon the Authority Granted to the Commission Under the Communications Act of 1934, and Both Statutes Give to the FCC the Flexibility to Regulate and License Satellite Services in the Public Interest.

As BTNA explained in its Comments, several provisions of the Satellite Act grant to the Commission the authority and obligation to license carriers to provide satellite system services in the public interest. The statute directs the Commission to guarantee to all present and future authorized carriers the nondiscriminatory use of, and equitable access to, the INTELSAT system. 47 U.S.C. § 721(c)(2). Whatever structure may have been deemed to be in the public interest under the competitive and diplomatic circumstances that existed in 1961, in today's world the nondiscriminatory and equitable access mandated by Section 721(c)(2) necessitates, at a minimum, the right of INTELSAT users to contract with and invest in INTELSAT directly.

By its terms, the Satellite Act affirmed and expanded the role established for the FCC by the Communications Act of 1934. Indeed, Congress explicitly directed the FCC to implement the goals of the Satellite Act "in its administration of the provisions of the Communications Act of 1934, as amended, and *as supplemented by* this chapter . . . ." 47 U.S.C. § 721(c) (emphasis added). Thus, consistent with the Commission's public interest obligations under the 1934 Act, Congress directed the FCC in the Satellite Act to, among other things,

- "require, in accordance with the procedural requirements of section 214 . . . that additions be made by . . . carriers with respect to facilities of the system

> . . . where such additions would serve the public interest, convenience, and necessity." 47 U.S.C. § 721(c)(10); and
>
> • upon advice from the Secretary of State that it is in the national interest to establish commercial communications to a particular foreign point by means of the communications satellite system and earth stations, "institute forthwith appropriate proceedings under section 214(d) . . . to require the establishment of such communication by the appropriate common carrier or carriers." 47 U.S.C. § 721(c)(3).

As these provisions indicate, Congress clearly envisioned that the FCC would be called upon to regulate carriers other than Comsat as INTELSAT evolved. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331 (1979) ("In construing a statute courts are obliged to give effect, if possible, to every word Congress used.").

Thus, Comsat's assertion that the Satellite Act's reference to Comsat as a common carrier in the provision of access to INTELSAT was meant to denote permanent exclusivity (*see* Comsat Comments at 12; Comsat Statutory Analysis at 10 & n.24 (citing 47 U.S.C. § 741)) is incorrect. The Commission's general discretion under the Communications Act to regulate in the public interest, as well as its specific duties under the Satellite Act, remove any doubt as to the its authority to issue Section 214 authorizations to common carriers other than Comsat to provide direct access to the INTELSAT system. Because the FCC already has the authority to regulate common carrier access to space segment under Section 214

of the Communications Act, no grant of authority is necessary to permit the FCC to authorize additional carriers to access INTELSAT directly.

To be sure, a statutory provision must be read in accordance with the framework of the entire statute. *See* Comsat Comments at 15-16. But Comsat confuses means and ends. Thus, according to Comsat, U.S. participation in INTELSAT through Comsat is one of the purposes and objectives of the Satellite Act. *See, e.g.,* Comsat Comments at 18 & n.52. In fact, the primary purpose of the Act was the expeditious establishment of a commercial international communications satellite system. *See* 47 U.S.C. § 701(a). Among the related goals of the Act were increasing the availability of telecommunications services, allowing nondiscriminatory access to the international system, and maximizing competition in the provision of the system's services. *See* 47 U.S.C. § 701(c). Contrary to Comsat's assertions, the creation and activities of Comsat were not aims in themselves but, rather, were vehicles to accomplish the fundamental and complementary Congressional objectives of access, competition and availability.

2. Neither the Language nor the Structure of the Satellite Act Establish Exclusivity for Comsat in the Provision of Space Segment Services.

Comsat's argument that the language and context of the Satellite Act demonstrate Congress' intent to grant it a permanent monopoly is wholly unconvincing. Thus, for example, while Comsat's extensive examination of the use of the definite and indefinite articles "a" and "the" may demonstrate that the

Satellite Act created a single corporation (*see, e.g.,* Comsat Comments at 17; Comsat Statutory Analysis at 44-45), it most assuredly does not establish a grant of statutory exclusivity with respect to that corporation's rights regarding the international system. Not once does the statute use words such as "sole," "only," or "exclusive" in reference to or connection with Comsat. This Congressional silence is most notable in Section 735(a), which simply lists three authorized powers of the proposed corporation without qualification.

Comsat also has taken the position that it -- rather than the Commission -- possesses the authority and discretion to regulate access to INTELSAT by others. In a 1997 submission to the FCC, Comsat stated that Comsat has an obligation to provide nondiscriminatory access to space segment capacity. Notice at ¶ 25. The Commission corrected Comsat's misapprehension in the Notice in this proceeding, reminding Comsat that the FCC, not Comsat, is the agency charged with that responsibility. *Id.* Yet Comsat persists in its attempts to rewrite the law and to usurp the role Congress assigned to the *Commission* in guaranteeing nondiscriminatory, equitable access to the system. Thus, for example, Comsat contends that "[s]pecifically, the Satellite Act calls for COMSAT to provide 'nondiscriminatory access to the system' for all U.S. customers. The statute then charges the Commission with ensuring that all U.S. users enjoy 'equitable access . . . under just and reasonable charges.'" Comsat Statutory Analysis at 53 (citing 47 U.S.C. §§ 701(c), 721(c)(2).

Contrary to Comsat's assertion, Section 701(c) does *not* call "specifically" or otherwise for Comsat to provide nondiscriminatory access to INTELSAT, but states that "[i]t is the intent of Congress that all authorized users shall have nondiscriminatory access to the system . . . ." 47 U.S.C. § 701(c). Read individually or together, the two cited provisions leave no doubt that the FCC is the agency entrusted with the duty and the discretion to provide equitable, nondiscriminatory access to INTELSAT. Comsat's further assertion that these provisions "simply ensure that all customers are treated equally *by* COMSAT" is wholly without support. *See* Comsat Statutory Analysis at 53 (emphasis in original).

Ultimately, Comsat's position reduces to the following: that the Satellite Act "implies" exclusivity of access, that authorizing direct access would not make sense, and that the use of exclusive terms in the statute would have been "redundant." *See, e.g.,* Comsat Comments at 15-23. Comsat's interpretation of the Satellite Act thus would strip the FCC of the regulatory powers vested in it under both the Satellite Act and the Communications Act of 1934. Such questionable deductive reasoning and rationalization do not hold up against the straightforward delegations of authority to the FCC. *See United States v. United Continental Tuna Corp.,* 425 U.S. 164, 168, 96 S.Ct. 1319, 1323 (1976) (disfavoring repeals by implication).

B. The Legislative History Indicates that Congress Intended to Affirm and Even to Increase the FCC's Authority Under Section 214 of the Communications Act of 1934 to Permit Level 3 and Level 4 Direct Access.

On top of the liberties it takes with regard to the statutory language, Comsat seeks to swamp this proceeding in a sea of legislative references to the origins of its current monopoly position with respect to INTELSAT access. Yet a review of the background of the Satellite Act demonstrates that Congress intended the FCC to retain in full its existing powers to regulate, and that the passage of the Satellite Act served to strengthen and extend that authority.

1. The Record Underlying the Satellite Act Demonstrates That the FCC's Licensing Powers Were to be Maintained and Increased.

In proposing the bill that became the Satellite Act, President Kennedy specified that

> [t]he draft legislation does not interfere with or limit the existing prerogatives of any Government agency; but because of the existing overlapping of responsibilities and interests, it seeks to define and identify these responsibilities and expressly assign them in an orderly fashion."

Letter from President John F. Kennedy to the President of the Senate and Speaker of the House (February 7, 1962), *reprinted in* S. Rep. No. 87-1584, 27, 29 (1962). As Secretary of State Dean Rusk further noted with regard to the system,

> the FCC has certain specific duties in this act, as well as other duties under the Communications Act, and it is given a regulatory authority here which is, I think, normal and standard under the circumstances, and it has procedures by which it can give effect to the policies of the act within the normal competence of the FCC.

Communications Satellite Act of 1962: Hearings Before the Senate Comm. on Foreign Relations on H.R. 11040, 87th Cong., 2d Sess. 185-86 (1962) ("*Foreign Relations Hearings*") (statement of Dean Rusk, Secretary of State)..

Testimony before Congress revealed the intent to create a flexible regulatory framework to accommodate new technology, economic developments, and international arrangements. As the Administrator of NASA explained, "I think it's very important to recognize that under the President's proposal there has been reserved, to be exercised by the Federal Communications Commission and other agencies of the Government, the capability of this Government to bring into being different kinds of services to serve different needs as time goes on." *Communications Satellite Legislation: Hearings on S. 2814 and S. 2814, Amendment Before the Senate Comm. on Commerce,* 87th Cong., 2d Sess. 150 (1962) ("*1962 Senate Commerce Hearings*") (statement by NASA Administrator James Webb). FCC Chairman Minow noted the expansion of his agency's power by responding to a question about the FCC's overall hand in the picture by stating "[i]ndeed, sir, it is a stronger hand than has existed in the past, because this bill, I think, has regulatory provisions which are not present in the present Communications Act." *Foreign Relations Hearings* at 50 (statement of Newton Minow, Chairman, FCC). *See also 1962 Senate Commerce Hearings* at 115 (statement of Newton Minow, Chairman, FCC) ("The bill also vests the Commission

with certain additional regulatory powers to assist in effectuating the purposes of the legislation.")

2. The D.C. Circuit Court of Appeals Has Recognized That Congressional Statements About Comsat's Role As a Monopolist Must Be Qualified by the Unforeseeability of a Developed INTELSAT System, and Do Not Give Rise to a Permanent Restriction on the FCC's Ability to Authorize the Provision of Space Services.

Throughout its pleadings, Comsat repeatedly cites references to statements made during the course of congressional hearings which indicate that Comsat was to have a monopoly. In particular, Comsat relies on public testimony and congressional debate during the early 1960s citing Comsat's role as a "carrier's carrier," and argues that direct access is unsupportable in light of these references. *See, e.g.,* Comments of Comsat at 9, 26 n.73; Comsat Statutory Analysis at 27-31.

But the statements relied on by Comsat have lost their relevance, as the meaning of many of those remarks is rooted in outdated assumptions of the era. The FCC Commissioners were unanimous in noting "that for the foreseeable future only one commercial space communication system will be technically and economically feasible." *Communications Satellite Legislation: Hearings Before the Comm. on Aeronautical and Space Sciences on S. 2650 and S. 2814,* 87th Cong., 2d Sess. 195 (1962) (statement of Newton Minow, Chairman, FCC). If the FCC today were bound by those views it would never have been able to authorize separate systems.

As the Court of Appeals for the D.C. Circuit has made clear, legislative statements such as those on which Comsat relies must be qualified by the practical realities and expectations obtaining at the time they were made. Specifically, the court has suggested that such materials should be reviewed in two distinct contexts: (1) an initial period of rapid development of the INTELSAT system, in which speed (and beating the Russians) was the highest priority; and (2) a post-deployment period, when the goals of competition and fair access assumed greater importance.

In *ITT World Communications v. FCC*, 725 F.2d 732 (D.C. Cir. 1984), the Court employed this framework in concluding that the Satellite Act grants the FCC broad discretion to designate non-carriers as "authorized users" capable of leasing channels from Comsat directly. *Id.* at 742. The Court noted that limiting the class of authorized users would effectively force the FCC to promote a two-tiered industry structure, with Comsat as a wholesaler and common carriers as retailers of satellite services. *Id.* at 742 n.22.

More important, in confirming that the FCC retains its full regulatory discretion under the Satellite Act, the Court directly rejected the claim of certain common carriers that the FCC should be handcuffed by the legislative materials which characterized Comsat as a "carrier's carrier":

> The legislative history of the Act reveals several predictions concerning Comsat's role in the industry as "primarily a carriers' carrier." . . . Although legislative history often clarifies Congressional intent, we do not believe that the predictions concerning Comsat's role in the industry support petitioners' assertion that Congress intended to restrict forever Comsat from serving the

> general public. During the many debates which preceded the Satellite Act, many legislators expressed a concern that competition between Comsat and the carriers, especially during the developmental years of the satellite system, would not facilitate the Act's primary purpose: "to establish . . . *as expeditiously as practicable* a commercial communications satellite system." 47 U.S.C. Sec. 701(a) (emphasis added). In our view, the predictions concerning the unlikelihood that such competition would occur during the developmental years were intended simply to convince legislators that the carriers would not interfere with the swift development of the new satellite system.

ITT World Communications v. FCC, 725 F.2d at 743 n.24.; *see also id.* at 745 ("Finally, the legislative scheme of the Act also supports the conclusion that Congress' predictions concerning Comsat's role as a carrier's carrier were not intended as a limitation on the FCC's discretion in designating non-carriers as authorized users."). Just as references to Comsat as a "carrier's carrier" did not limit the FCC's discretion to introduce competition in the retail tier of the space segment service market during the post-development years, the FCC now must recognize that it has similar discretion in allowing access to the wholesale market. 1/

1/ Elsewhere in the communications field, the D.C. Circuit has underscored the importance of accommodating deficiencies in congressional foresight. In assessing the FCC's regulation of direct broadcasting services ("DBS") under the Communications Act of 1934, and given the fact that Congress did not even contemplate DBS in 1934, the D.C. Circuit stated that "the limitation on Congress' ability to foresee or consider particular problems that may in the future arise under a statutory scheme often require that legislation be drafted by reference to general categories rather than to specific classes of activities within those categories." *NAB v. FCC*, 740 F.2d 1190, 1203 (D.C. Cir. 1984) (quoting *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 770 (D.C. Cir. 1984)). The broader purposes of

In light of the broader goals of nondiscriminatory access and competition, the Commission's obligation to ensure nondiscriminatory access (the general category referenced by the Satellite Act) therefore necessarily entails the discretion to regulate Level 3 and Level 4 direct access (the specific classes of activities which were not foreseeable at the time of the Act's passage).

C. Neither The FCC Nor the Courts Have Dispositively Interpreted the Satellite Act to Grant an Exclusive Franchise Over Access to Comsat.

Comsat's claims that the FCC and the courts have created an unbroken, 40-year body of precedent expressly recognizing exclusivity of access are unfounded. *See* Comsat Comments at 2, 14, 28-30; Comsat Statutory Analysis at 67-76. For far too long, Comsat has been able to perpetuate its monopoly by hiding behind FCC and court statements that merely reflected the reality that only Comsat was then authorized to provide INTELSAT space segment services, or that until 1994, INTELSAT did not permit direct access. These descriptions of the anticompetitive conditions of the satellite marketplace should not be mistaken for formal interpretations that the FCC lacks discretion to implement Level 3 and Level 4 direct access.

For example, Comsat quotes one portion of the FCC's 1980 *Comsat Study* which mentions in passing Comsat's current monopoly in providing

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the statute should guide the interpretation of those categories. *NAB v. FCC*, 740 F.2d at 1203.

INTELSAT services. *See* Comsat Comments at 29 (citing *COMSAT Study -- Implementation of Section 505 of the International Maritime Satellite Telecommunications Act,* 77 F.C.C. 2d 564, 693 (1980) (*"Comsat Study"*); Comsat Statutory Analysis at 72-73. But the cited reference is a descriptive one, not a statutory analysis. More important, Comsat ignores the fact that *the Commission recognized its authority to permit investment direct access to INTELSAT in the very same report.* In response to requests by other carriers for access to Comsat's facilities and authorization to invest in INTELSAT circuits, the FCC indicated that INTELSAT's operating agreements at that time were the only bar, and, indeed, that it envisioned the day when it would implement direct access:

> Under the present structure, only Comsat may invest in space segment, but Comsat may not generally provide service directly to end-users. While we would not find it efficacious to renegotiate the INTELSAT Operating Agreements in order to permit other carriers to acquire INTELSAT space segment, *in the future, it may become appropriate for the Commission to consider the feasibility of implementing measures which would authorize multi-carrier investment in INTELSAT space segment -- while allowing Comsat to retain "legal title" to the U.S. portion of the facilities.* Under such an arrangement, other carriers could earn a reasonable rate of return from their investments. Also, the delicate balance which exists with respect to voting rights in INTELSAT would not be upset, because as titleholder of the facilities, Comsat would remain the sole U.S. Signatory to INTELSAT.

Comsat Study at 758 ¶ 500 (emphasis added) (footnotes omitted). *See also Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, Notice of Inquiry,* 90 F.C.C. 2d 1446, 1455

(1982) (emphasizing that Comsat's role in the INTELSAT system would be unaffected by direct access and because it would remain the sole U.S. Signatory; continue to represent U.S. interests as a member of the Board of Governors and in the Meeting of Signatories; and be the sole U.S. entity for INTELSAT planning and development of future systems).

Comsat also points to statements by courts which it claims validate its monopoly, but this approach, too, is circular. These judicial pronouncements merely reflect the reality that Comsat currently is the only U.S. entity authorized with access to INTELSAT, not that it has an entitlement to this anticompetitive status. For instance, the D.C. Circuit noted that as a result of INTELSAT's creation in 1964, "COMSAT became the U.S. representative to INTELSAT and the sole U.S. entity permitted access to the system." *NAB v. FCC*, 740 F.2d at 1214. Comsat maintains that this description establishes that the Act must be read to mandate Comsat's exclusive access to the system. Comsat Comments at 29. But this statement simply reflects the fact that Comsat was and is the only entity authorized by the FCC with access to INTELSAT, and neither this statement nor any other part of this case interprets the Satellite Act to bar the FCC from authorizing direct access to other carriers.

Comsat also contends that the fact that its monopoly has existed for nearly 40 years constitutes a sufficient basis to extend it. Comsat Comments at 28-30. But, as the Commission stated in the *Authorized User* proceeding, "[t]he

length of time a policy remains in effect does not confer additional status to it. A policy remains valid only so long as the reasons for its promulgation remain. . . . We believe the time has come for a new regulatory response in the international satellite-communications market." *Authorized Users II*, 90 F.C.C. 2d 1394, 1407 (1982).

Comsat is authorized to serve end users directly. INTELSAT, meanwhile, has authorized investment direct access. The time has come for the Commission to authorize investment in INTELSAT space segment by entities other then Comsat.

D. Subsequent Legislation Confirms that Congress Intended to Grant Discretion to the FCC to Adopt Direct Access and that Comsat's Access to INTELSAT Space Segment Is Non-exclusive.

Comsat's position that "Congress, too, has remained steadfastly consistent in its view that COMSAT has an exclusive franchise to INTELSAT," Comsat Comments at 14, flies in the face of Congressional statements and actions on this topic. As BTNA noted in Section III.A of its Comments, the House Commerce Committee recently found "that the Commission currently has the authority to permit direct access under current statutes," and that "[b]y including provisions in this bill on direct access the Committee does not intend to imply that there is a need to amend any provision in the [Satellite] Act to provide for direct access." H.R. Rep. No. 105-494 at 21, 61 (1998). These findings are not compatible with exclusivity, much less "steadfastly consistent" with it.

Comsat's assertions with regard to Inmarsat are illogical. Despite the FCC's recognition that Congress' designation of Comsat as the "sole operating entity" of the U.S. for participation in Inmarsat contrasts with the non-exclusive role it has for INTELSAT system services, Notice ¶ 29, Comsat persists in arguing that the similarities are "striking." Comsat Comments at 33; Comsat Statutory Analysis at 82. In support, Comsat cites the principle that repetition in an amendment of words used in the original act indicates the same sense should be presumed in the amendment. Comsat Comments at 34 (citing *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 522 (1st Cir. 1987)). However, this principle is wholly irrelevant where the words used in the amendment -- particularly expressions of exclusivity, such as "sole" -- do not even appear in the original legislation. Moreover, Comsat's position here is impossible to square with its argument that the use of language expressly establishing exclusivity with respect to access to the INTELSAT system would have been redundant. *See* Comsat Comments at 15.

III. IMPLEMENTATION OF LEVEL 3 AND LEVEL 4 DIRECT ACCESS WOULD SERVE THE PUBLIC INTEREST BY PROMOTING COMPETITION IN THE DELIVERY OF INTERNATIONAL VOICE , DATA AND VIDEO COMMUNICATIONS.

Contrary to Comsat's assertions, the introduction of Level 3 and Level 4 direct access to INTELSAT will benefit U.S. consumers of international telecommunications services by facilitating competition in the provision of such

services. As shown below, the harms that Comsat asserts would result from direct access do not withstand scrutiny.

A. Direct Access Will Provide Substantial Benefits to Consumers.

[Notice, Section II(2)]

The Notice contains an extensive discussion of the potential public interest benefits that would be derived from the implementation of direct access in the United States. *See generally* Notice at 29-34. Indeed, as the Commission stated in the Notice, it previously has acknowledged several public interest benefits of direct access including, in particular, that, by reducing Comsat's market power across a number of markets for telecommunications services, direct access would generate "the potential for price competition, service quality improvements, and innovation." *Id.* at 33 (*citing Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier,* 13 FCC Rcd. 14083, 14159 ¶ 155 ("*Comsat Non-Dominant Order*")). The Commission also has noted the direct consumer benefits of direct access that already have been demonstrated in other countries *See* Notice at 29 (*citing* "Accessing INTELSAT . . . Directly," *reprinted in* Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, at 135-41).

BTNA has demonstrated the ways in which the implementation of direct access has increased competition in the U.K. market. *See* Comments of

BTNA at 3-8. Numerous other commenters in this proceeding have described at length the significant public interest benefits that would derive from the implementation of direct access in the United States. *See, e.g.*, Comments of MCI Worldcom, Inc. (Dec. 22, 1998) at 9 -21; Comments of Sprint Communications Company, L.P. (Dec. 22, 1998) at 6 -10; Comments of Loral Space & Communications Ltd. (Dec. 22, 1998) at 3 -7; Comments of GE American Communications, Inc. (Dec. 22, 1998) at 7 -10; Comments of Cable & Wireless USA (Dec. 22, 1998) at 1-6 ("Cable & Wireless Comments"). These comments need not be repeated here.

But BTNA wishes to emphasize that its observations regarding the pro-competitive, pro-consumer benefits of direct access are based not simply on theory, but on its real-world experience following the implementation of Level 4 direct access in the U.K. in 1994. Direct access has reduced the costs of INTELSAT access in the U.K. far below equivalent charges in the United States while at the same time significantly increasing competition in the U.K. satellite services market. *See also* Cable & Wireless Comments at 2 (benefits of direct access in U.K. include "immediate and dramatic" cost savings and streamlined administrative processes, among others). By allowing users to bypass the Comsat bottleneck, and thereby to avoid paying Comsat's monopoly rates, implementation of direct access in this country will similarly lower the cost of INTELSAT access for carriers and other users, and ultimately will result in lower prices for end-user consumers.

In attempting to minimize the benefits that end users would receive from direct access, Comsat raises speculative assumptions that betray its fear and misunderstanding of a competitive market. Specifically, Comsat alleges that end-users will not reap the benefits of direct access because (1) foreign carriers will likely appropriate some of these savings, and (2) U.S. retail carriers will likely not pass their share of savings through to their customers. Comsat Comments at 74. Comsat's call for protectionism should be rejected as inconsistent with the spirit of the World Trade Organization Agreement on Basic Telecommunications Services and *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* 12 FCC Rcd. 23891 (1997).

Comsat's second premise also is misguided, and reflects Comsat's concern about losing its advantaged status as the only wholesaler in the retail market. End-users inevitably will benefit where an open market dictates competition. As the Chief of the International Bureau explained to Congress with regard to Level 3 and Level 4 direct access, "[i]n a competitive telecommunications market, it is reasonable to expect that service providers will pass through lower costs in the form of lower rates to consumers." Letter from Regina M. Keeney to Thomas Bliley, December 22, 1997, *reprinted in* Record of Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection re: "Communications Satellite Competition and Privatization Act of 1998," Sept. 30, 1997 at 146, 148. The very fact that users have turned to Teleglobe for INTELSAT

access demonstrates that they are demanding lower prices and will use them where competitive alternatives are available.

B. Comsat's Imaginative Claims That Direct Access Will Harm U.S. Consumers Do Not Withstand Scrutiny.

[Notice, Section II(3)]

1. Allowing U.S. Carriers Direct Access to the INTELSAT System Would Serve the Public Interest Without Conferring an Unfair Competitive Advantage on INTELSAT.

Comsat contends that direct access would afford INTELSAT expanded access to the domestic U.S. telecommunications market. However, direct access *per se* does not open new markets to INTELSAT, it simply allows U.S. carriers and users to obtain existing INTELSAT services without being subject to Comsat's monopoly mark-up over the IUC. Comsat is not currently permitted to exercise discretion over which customers it accepts – it has to offer access to INTELSAT to anyone requesting it. Comsat does not perform any gatekeeping function and direct access is therefore not opening a market that is currently closed.

2. The Introduction of Direct Access Would Not Reduce the Influence of the U.S. in INTELSAT.

Comsat argues that direct access would harm its function as a Signatory by causing a reduction in the U.S. voting share. *See* Brattle Analysis at 40. This would not occur. The U.S. Signatory vote in INTELSAT is a function of the proportionate U.S. use of the INTELSAT system. Under direct access, the distribution of customers to U.S. carriers other than Comsat would not diminish the

aggregate use or the Signatory's related voting power. In fact, U.S. investment in INTELSAT would increase significantly if competitive access to INTELSAT stimulates greater demand for INTELSAT services in the United States. 2/

3. Alternative Satellite and Submarine Cable Systems are Limited INTELSAT Substitutes That Do Not Exert Sufficient Price Pressure on Comsat

Comsat overstates the mitigating effects of the existence of other international satellite operators and transoceanic fiber optic cables. The Commission should be assured that few consumers choose to pay Comsat's rates where realistic alternatives exist. The decline in Comsat's share of the marketplace is more a sign of Comsat's customers deserting the organize as soon as alternatives become available than it is an assertion that Comsat's rates are subject to competitive pressure. Competition has not driven Comsat's prices anywhere near cost (nor have Comsat's prices put downward pressure on its partial competitors). As Comsat suggests in its brief, its most threatening competition is from neither satellite nor cable systems – it is from Teleglobe, an INTELSAT Signatory who is able to satisfy U.S. carriers' demand for lower cost access. *See* Comsat Comments

2/ As Regina Keeney noted in discussing Level 3 and Level 4 direct access: "To the extent direct access promotes additional use of INTELSAT for U.S. traffic beyond Comsat's current proportionate use of capacity, Comsat's voting power on the Board might increase (it has been steadily decreasing over the years)." Letter from Regina M. Keeney to Thomas Bliley, December 22, 1997, reprinted in Record of Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection re: "Communications Satellite Competition and Privatization Act of 1998," Sept. 30, 1997 at 146, 148.

at 59-60. As the Commission understands, direct access to INTELSAT will provide beneficial competitive pressure on Comsat.

4. Comsat Has Failed to Justify the Direct Access Subsidies It Would Demand from INTELSAT Users.

Comsat argues that if direct access is implemented, it is entitled to impose surcharges on other direct access users to cover its costs. Comsat at 82-83; Brattle Analysis at 33-38. Although careful analysis of Comsat's submission utterly fails to clarify the nature of, and justification for these costs, they appear to consist primarily of certain insurance expenses; "other" Signatory expenses, *see* Comsat Comments, Affidavit of Theodore W. Boll ("Boll Affidavit"), Exhibit 4; and a "shortfall in investment returns," which appears to be what can be described as the "lost profits" that Comsat apparently foregoes after being subject to competitive pressure. *See* Brattle Analysis at 34-35. Comsat states that these and other components would require surcharges ranging from 28.67% to 45.88% over the applicable IUCs paid by direct access users. Comsat Comments at 83. This unjustified attempt to maintain the revenue stream generated by its monopoly today must be rejected by the Commission.

Comsat's limited surcharge justifications do not survive scrutiny. First, Comsat's satellite insurance expenses, properly understood, are not the type of expenses that its competitors should bear. INTELSAT itself covers the cost of insurance for its satellites and launches, and these costs are recovered as a component of the IUC. As best as BTNA can determine, Comsat appears to seek

compensation for its independent policies that insure lost Comsat business in the event of an INTELSAT satellite outage. If this interpretation is correct, this would be Comsat's business risk insurance that must not be borne by Comsat's competitors.

Although Comsat would incur some expenses in connection with its Signatory function, Comsat surely has exaggerated the magnitude of such expenses. For example, Comsat records as a direct Signatory cost 25 percent of the total costs of its headquarters facilities. Boll Affidavit, Exhibit 4. No documentation or other explanation is given for this incredible cost allocation -- one-quarter of Comsat's facilities fully dedicated to Signatory functions. Similarly astounding, Comsat claims that an amount equal to approximately 10 percent of the revenue it collects as utilization charges is allocable to its Signatory-related functions -- again without any semblance of detailed cost justification.

In contrast to Comsat's estimated Signatory costs, and as BTNA stated in its initial pleading in this proceeding, BT's own Signatory expenses in the UK Level 4 direct access environment are a small fraction of the levels suggested by Comsat. Indeed, BT does not collect any 'Signatory function' costs from UK entities benefiting from Level 4 access to INTELSAT -- such entities are simply required to pay the flat IUC. *See* BTNA Comments at 5-6. Thus, BTNA can only express its incredulity at the gap between BT's UK Signatory function costs in a post-direct access environment and those predicted by Comsat.

Finally, Comsat appears to argue that is entitled to charge other direct access users for lost revenues when Comsat loses business in a competitive environment. In its bare essence, Comsat seeks surcharges designed to provide a secure rate of return, as if it were a dominant carrier, regulated under a rate base/rate of return regime. *See* Comsat Comments at 83. The irony in this claim is not lost, given Comsat's recent fight for classification as a non-dominant carrier, arguing that it was prepared to price its services according to the demands of a competitive marketplace.

Comsat argues that its return on its INTELSAT investment of 12.48% after taxes is low relative to companies that it considers to be comparable. Boll Affidavit, Exhibit 2 at 5. However, these are irrelevant and inappropriate comparisons: Comsat's return surely reflects the low risk Comsat has faced as a *de facto* monopolist. Comsat argues that other companies, including other INTELSAT Signatories, have the opportunity to supplement their returns through more profitable businesses. However, Comsat does not acknowledge that it has the right to enter into such alternative and potentially higher value businesses. 3/ Direct

3/ In the *Comsat Study* released in 1980, the FCC determined that Comsat may enter new lines of business not inconsistent with its statutory mission, so long as such activities do not interfere with its performance of INTELSAT or Inmarsat duties. *Communications Satellite Corporation, Final Report and Order,* 77 F.C.C. 2d 564, 610 ¶ 118 (1980). To avoid conflicts of interest between Comsat's provision of INTELSAT and Inmarsat services ("jurisdictional services") and non-jurisdictional services, as well as to address other policy concerns, the FCC imposed structural separation requirements on Comsat's jurisdictional activities. *Corporation Changes in the Corporate Structure and Operations of the Communications Satellite Corporation,* 90 FCC 2d 1159, 1198-99 (1982). Last year

access users should not be burdened with a surcharge, the purpose of which is to compensate Comsat for the "cost" of missed opportunities and the loss of monopoly privileges.

IV. CONCLUSION

For the reasons stated above and in BTNA's initial comments, the Commission has the authority to implement Level 3 and Level 4 direct access and should do so.

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Dated: January 29, 1999

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the Commission granted Comsat's request to remove the structural separation requirements for Comsat's INTELSAT services. *Comsat Non-Dominant Order*, 13 FCC Rcd. at 14165 ¶ 166 (1998).

CERTIFICATE OF SERVICE

I, LaVonnia Brown, a legal secretary with the law firm of Hogan & Hartson L.L.P., hereby certify that on this 29th day of January, 1999, a copy of the foregoing Reply Comments of BT North America Inc. was hand delivered to each of the parties listed below.

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